

# **SELECTIONS IN ETHICS FOR FACILITATORS**

- Duty of Competence
- Duty to Supervise
- Duty of Impartiality
- Duty of Confidentiality
- Communications with Bench Officers

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## **FACILITATOR ETHICS**

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- Duty to Supervise
- Duty of Impartiality
- Duty of Confidentiality
- Communications with Bench Officers

Facilitators are bound by the California Rules of Professional Conduct (CRPC) as are all California attorneys. Many of the Rules, however, do not apply to the circumstances of Facilitator employment. Facilitators should also be familiar with the Code of Judicial Ethics, The Code of Ethics for Court Employees of California and the Guidelines for the Operation of Family Law Information Centers and Family Law Facilitator Offices (Facilitator Guidelines) all of which provide valuable guidance.

Rules of Professional Conduct for attorneys that do not apply to the circumstances of Facilitator employment are rules regarding the attorney-client relationship and the conduct of an attorney in that relationship.

Other Rules of Professional Conduct protect the integrity of the legal system and the public at large, whether or not the attorney is in an attorney-client relationship. The latter rules do apply to the circumstance of Facilitator employment.

Some examples of the rules that do apply are:

### **Duty of Competence**

- Competence within context of the program
- Supervision of non-attorney staff

California Rules of Professional Conduct 3-110 provides that:

- (A) A member shall not intentionally, recklessly or repeatedly fail to perform legal services with competence.
- (B) For purposes of this rule, “competence” in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional and physical ability reasonably necessary for the performance of such service...

The fact that Facilitators have no attorney-client relationship (Family Code §10013) with their customers does not relieve them of the duty to supervise nor of the duty to act competently within the limited context of the program. Just as a Judge is required to maintain professional competence in the law in order to

perform a Judge's duties, (Code of Judicial Ethics, Canon 3B(2)), so too must a Facilitator in order to perform his/her duties.

Facilitators are responsible for providing customers with competent and complete legal education and information. This includes identifying all options available to the customer so that an informed decision can be made. For example, upon reviewing the file with the customer, it may become apparent that the customer had not been properly served, or may otherwise be eligible to have the judgment set aside, or alternatively that the customer might be entitled to a modification of the current support obligation and restoration of his or her driver's license, or both. The duty of competence would require that the Facilitator provide complete information about these options so that the customer can make an informed decision about how to proceed.

The Facilitator does not have the obligation that an attorney in an attorney-client relationship has to attempt to identify all issues, however the Facilitator should educate the customer regarding issues that become evident and educate the customer about options.

Further, the Facilitator should inform the customer when the Facilitator sees there are issues that will require the assistance of a private attorney to protect valuable or important rights. (See Facilitator Guidelines sections (6) and (7).)

### Duty to Supervise

Practically speaking, the duty to supervise focuses on two critical areas:

- Competence of services. Non-attorney staff must be adequately trained and supervised to ensure that the education and information they provide to the public is always accurate, up to date and that the public is treated with courtesy and respect."
- A Facilitator is responsible for the supervision of non-attorney employees in the same manner a judge is responsible for the conduct of the courtroom personnel. Code of Judicial Ethics, Canon 3B(4) requires judges to ensure patient, dignified and courteous treatment of litigants by court staff and other personnel under their direction and control.
- Understanding of Court's Role – It is critical that all non-attorney staff clearly understand the Court's Role in providing unbiased assistance.

Facilitator attorneys must make sure that non-attorneys understand the importance of the role of the court in providing education and information to the public. The court must maintain its independence and be available to all court users, including potentially both sides of any case in the court. All non-attorney staff must be able to make it clear to customers that no attorney-client

relationship exists so that the customer does not develop expectations of service beyond what the Facilitator's office can provide. (CRPC 1-400(D))  
The Facilitator's "Disclosure" (See Family Code section 10015) tells the customer that there is no attorney-client relationship and no privileged communications. Paralegal, clerks or other non-attorney staff should explain their status as a matter of routine. A simple explanation can be given at the outset of the assistance: e.g.

"Good morning, my name is \_\_\_\_\_, I am a (paralegal, law student intern, etc.). I am not an attorney, but am working under the supervision of the family law facilitator attorney

### Duty of Impartiality

Facilitators must ensure that all customers receive and read a copy of the "Disclosure" under Family Code sec.10013 which makes clear that the Facilitator:

- Does not represent any party;
- That no attorney-client relationship is formed;
- That communications between the party and the Facilitator are not privileged; and
- The Facilitator may provide services to the other party.

Some basic guidelines regarding impartiality:

- Don't provide information to one party that you would not be willing to provide to the other party.
- Don't discuss strategy or anything that would give one party an advantage over the other party.
- Discuss options, but don't tell a party what course of action he/she "should" take, or what the "best" approach would be.
- Remember that you are there to ensure meaningful access to the court, to see that procedural requirements are met and that the customer can receive a fair and meaningful hearing. You are not there to assist the customer to achieve a particular result nor to protect all of the customer's rights.
- If you find yourself becoming invested in achieving a particular result, you are losing your impartiality; if possible, turn the case over to someone else to complete.

### Duty of Confidentiality

All persons employed by the Family Law Facilitator's Office and all persons under their supervision are subject to the provisions of paragraph (9) of subdivision (B) of Canon 3 of the Judicial Code of Ethics. These persons must be given a copy of these provisions and sign an acknowledgment that they are aware of them. (Family Code section 10014).

The Canon provides:

A judge [Facilitator] shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge [Facilitator] shall require similar abstention on the part of court personnel subject to the judge's [Facilitator's] direction and control ....

- Although there is no attorney-client privilege, if the Facilitator has assisted one party, the Facilitator should not reveal information given by that party if the opposing party comes for assistance.
- Information that has been put into papers filed with the Court can and should be revealed to the opposing party. (Unless the Facilitator is certain that the documents have actually been filed with the court, pleadings should not be discussed with the opposing party.)
- Facilitators should not gossip about a pending case even if the information has been filed in the court file.
- Do not discuss pending cases with non-FLF staff. Be especially careful not to discuss the merits of the case with judicial officers or their courtroom staff.
- Because Facilitators have no attorney-client privilege they and their work-product may be subpoenaed. It is a good practice to not keep files or notes on customers.
- Do not use your position to access the court files of a case involving yourself, relatives or friends. Any file you wish to see, other than in the course of your employment, must be accessed in the same manner as it would be by any member of the public.

#### Communications With Bench Officers

- Under California Rules of Professional Conduct Rule 5-300 a member may not comment on the merits of a matter pending before the judge, directly or indirectly except in open Court or under some strictly limited circumstances.
- Under Facilitator Guidelines:
  - Facilitators have the duty to avoid all ex parte communications with a judge or judicial officer except as provided in Family Code section 10005.
  - Facilitators “should avoid all communications with a bench officer in which he or she offers an opinion on how the bench officer should rule on a pending case.”
  - Although the guidelines state that “Communications about purely procedural matters or the functioning of the court are allowed and

encouraged”, Facilitators should avoid such communications if the communication is in reference to a particular case.

- When in doubt as to the propriety of a communication – avoid communicating with the bench officer.
- Avoid even the appearance of impropriety.

A major function of the Facilitator is to preserve the integrity and impartiality of the Court.

Beware of possible pitfalls of undertaking duties under Family Code section 10005.

- Section (a)(6) points out one conflict that exists – a Facilitator may not serve as a special master if he/she has served as a mediator in that case.
- Acting as a Judge Pro Tem in a courtroom that hears cases which may have had that Facilitator’s assistance is almost certain to create a conflict.

I acknowledge receiving and reading a copy of these Selections in Ethics for Facilitators together with the attached copy of Appendix C to the California Rules of Court, Guidelines for Family Law Information Centers and Family Law Facilitators Offices.

Date:\_\_\_\_\_

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FLF Staff Member